IN THE

Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

JOSEPH S. LORD, III,
SEYMOUR I. TOLL,
RICHTER, LORD, FARAGE & LEVY,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pa.

International, 236 Chestnut St., Phila. 6, Pa.

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This Brief is submitted in reply to Respondent's Brief in opposition to Petition for Writ of Certiorari.

ARGUMENT.

Point I.

Respondent's "Question Presented" Does Not Formulate the Issue at Bar.

The square issue before the Court turns on whether any part of petitioner's duties, in the language of the 1939 Amendment to the Federal Employer's Liability Act involved:

> "the furtherance of interstate commerce . . ., [or] in any way directly or closely and substantially affect such commerce. . . ."

A meaningful formulation of that issue must necessarily include the realities of the job in question. Respondent's "Question Presented" does not.

It characterizes petitioner as a "file clerk" and frames her job in terms of "the sole duty" . . . of "carry[ing] tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building".[1]

We submit that the question as presented is unanswerable because it does not comprehend the true functional nature of petitioner's job. As we urged in the Petition,[2] unless and until that true functional nature is analyzed, any attempt to apply the 1939 Amendment is an exercise upon the irrelevant material of status and job importance. It is as though a master train dispatcher (who unquestionably falls within the 1939 Amendment) were characterized thus:

> "An office worker who, in performing his duties, never left the fifth floor of an office building and did nothing more than watch colored lights on a blackboard, use the telephone and put telegrams in a box for future filing."

One looks in vain throughout Respondent's Brief for the slightest effort on its part to come to grips with the actualities of Petitioner's job.

We urged the applicabilty of a test based upon the reasoning of this Court in *Overstreet v. North Shore Corp.*, 318 U. S. 125, 63 S. Ct. 494 (1943) in the Petition:[3]

> "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?"

Respondent never addressed itself to the question or the *Overstreet* case. If it had, it would have been forced to probe to the heart of the facts in the case at bar and

1. Respondent's Brief, p. 1.
2. "Point II", p. 17, *et seq.*
3. P. 21.

necessarily to the conclusion that Petitioner's job is comprehended by the 1939 Amendment. It is that conclusion to which the majority's reasoning about the "dire chain of catastrophe" inexorably leads, but the majority arbitrarily refused to reach it.

Point II.

Respondent's "Statement of the Case" Is Inaccurate.

Respondent's Brief [4] states:

> "Chief Judge Biggs dissented, on the ground that, although 'such a result may be unfortunate', Congress, in adopting the 1939 Amendment, apparently intended to bring most railroad employees within the scope of the Act."

As even a cursory reading of the dissent will indicate, Chief Judge Biggs faced the problem which respondent has not, and grounded his dissent on the fact that "The duties of the plaintiff, like those of everyone else employed in the same department, furthered interstate commerce".[5] He found that such duties inevitably invoke coverage under the 1939 Amendment, as indeed they do.

That Respondent should misconceive the nub of the dissent is striking confirmation of its avoidance or misunderstanding of the real question at the core of the case.

Point III.

Respondent's Statement of Petitioner's Position With Respect to the Prerequisite of Coverage Under the 1939 Amendment Is Grossly Inaccurate and Misleading.

Respondent states in its brief: [6]

"Petitioner contends . . . that following the 1939 Amendment the remedy became available to any em-

4. P. 2.
5. Petition, p. 35.
6. P. 4.

ployee regardless of the nature of his work, provided only that his duties have *some eventual* effect on the interstate business of the carrier." (Emphasis supplied.)

A more distorted paraphrase of our position is not readily imaginable. At the risk of being overly repetitious, the Petition repeatedly and scrupulously hewed to the precise language of the 1939 Amendment in considering the scope of that legislation.[7]

Nothing was said or argued by Petitioner with respect to duties having "some eventual effect on the interstate business of the carrier". That is an obvious straw-man created for argumentative purposes by the Respondent.

We are indifferent to the "eventual effect" of petitioner's duties, for the 1939 Amendment is indifferent. That is not the test and it is not the question in the case. Furthermore, it is not "regardless of the nature of [the] work" but *solely because* of it that petitioner's job is comprehended by the 1939 Amendment. What is at issue, and what the respondent refuses to consider is whether the test laid down within the four corners of the 1939 Amendment applies here. We say that test does apply; that she is entitled to the full remedial effect of the legislation in which that test is embodied; and that the failure of the majority to apply it as it was meant to be applied is an error of such magnitude that the grant of certiorari is, we respectfully submit, urgently indicated.

Respondent strikingly points up the error of the majority of the Court of Appeals when at page 4 of its Brief it stated that the Court of Appeals rejected the "eventual effect" contention. Indeed it did, and in doing so, it too was creating and then destroying a test that we never urged is applicable. The test we did urge upon the Court of Appeals was one which the majority erroneously failed to con-

7. See "Point I" at p. 7; pp. 9, 13, 21.

sider, and yet it is one which Congress enacted in the 1939 Amendment to the FELA. On no discernible grounds other than a statutory construction which is inherently untenable[8] the majority has warped a statute and confused a vast body of decisional law which has until now developed with strikingly salutary uniformity.

Point IV.

Respondent's Analysis of the Scope of the 1939 Amendment Rests on Incomplete and Therefore Misleading History.

Legal history creates sound law only if it is full history. The history described by Respondent is not.

Contrary to Respondent's contention at page 9 of its Brief, the 1939 Amendment was not a petrifaction of the pre-1939 scope of coverage of the Employers' Liability Act.

The legion of back-shop cases[9] following the 1939 Amendment will not disappear no matter how strongly Respondent contends that the Amendment did nothing more than eliminate the moment of injury test and assumption of risk. Those cases must be reckoned with and identified for what they are: an orderly, consistent body of new law emerging from the expanded scope of coverage created by the 1939 Amendment.

No amount of argument will eliminate the hard fact that S. Rep. No. 661, 76th Cong., 1st Sess. 2, 3 provides, inter alia:

> "It is the aim of the bill to amend the Employers' Liability Act in three particulars:
>
> 1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate commerce."

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8. See Petition, pp. 16-17.
9. See fn. 3, Petition.

Respondent's theory of the "broadening"[10] effect is a statutory constriction unsubstantiated in law. The Court of Appeals for the Third Circuit made that clear in *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) at 799-800:

> "There is no doubt that the amendatory language broadened the coverage of the Act. It seems to have done so in *two different ways.* First, the phrase 'any part of whose duties' clearly eliminated the moment of injury test. The new phrase makes the general nature of the employee's duties the controlling factor. If 'any part' of those duties furthers interstate commerce, the employee is covered, even though at the precise moment of injury the specific mechanical task in which he was engaged was purely intrastate. Second, the amendment extended coverage to one not immediately engaged in furthering interstate commerce if his duties in any way closely and substantially affected the furtherance of interstate commerce. The amendment itself is stated disjunctively, that is, it covers an employee if any part of his duties further interstate commerce, *or* if any part of his duties in any way directly, or closely and substantially affect such commerce. If that is the sense of the Act as presently worded, we think the plaintiff here is covered by both tests." (First Emphasis added.)

The Court of Appeals for the Seventh Circuit stated in *Shelton v. Thomson*, 148 F. 2d 1 (C. A. 7, 1945) at 3:

> "There can be no doubt but that the [1939] amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was

10. Brief, fn. 27.

this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employments in '*furtherance* of interstate . . . commerce' are within the Act. The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic."

Quoting selectively from the testimony of T. J. McGrath, as did the majority of the Court of Appeals [11] and the Respondent,[12] does not erase Mr. McGrath's further testimony:

"I did not draw the amendments and do not know who did. I have not given them close study and deep thought but I infer that it was probably given pretty close scrutiny by someone." [13]

Point V.

Respondent's Comparison With Contemporary Legislation Involving the Commerce Power Throws No Light on the Question at Bar.

We fail to see what significance in the context of this case can be drawn from Congress's failure to occupy the entire field covered by its power under the Commerce clause. Conceding *pro arguendo* that all employees of interstate carriers might be covered by appropriate federal legislation, how does Congress's failure to so act resolve the question of whether petitioner is covered by the 1939 Amendment?

The uselessness of this portion of petitioner's argument appears in its conclusion at page 20 of the Brief:

"[Congress] failed to define commerce in broader terms than transportation or to give any other indica-

11. Petition, p. 29.

12. Brief, pp. 15-16.

13. *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. on S. 1708, at 76 (1939).

tion that it intended to legislate to the limit of its power under the commerce clause. It thereby precluded a valid contention that it intended that employes whose duties were local in character and not connected with interstate transportation were brought within the coverage of the Act."

But these are the questions at bar: (1) *What is "transportation"* and (2) *were petitioner's duties "local in character and not connected with interstate transportation"?* In a real sense, to ask these questions is to show the fundamental flaw in Respondent's entire brief. It has dealt with a multitude of subjects in detail, none of which involves a frank analysis, or any analysis, of either the facts at bar or the meaning of "transportation" as against "commerce".

It is simple enough for Petitioner to claim coverage under the 1939 Amendment and for Respondent to deny it. But in the end, it is the facts of the case and not the conclusions of counsel which bear the answer and it is the meaning of "commerce" which controls the legal impact of those facts. We have met these. Respondent has not.

Point VI.

Respondent's Analysis of the Classes Covered by the 1939 Amendment Cannot Subsume Straub v. Reading Co., 220 F. 2d 177 (C. A. 3, 1955).

We submit that Respondent's analysis of the groups covered by the 1939 Amendment is verbalism, not precedent. It is sufficient in that connection to observe, as we have argued, the remarkable intra- and inter-circuit conflicts generated by the majority's refusal to follow its own ruling in the *Straub* case.[14] That case, with which respondent never takes issue, simply cannot be squeezed within the shrunken confines of any of the "three concentric circles" proposed

14. Petition, pp. 23-24.

by respondent,[15] If it can, then a fortiori this case must, for the instant facts are much less attenuated, coverage-wise, than *Straub*.[16]

Point VII.

Respondent Has Completely Ignored, Not Only the Facts at Bar, But the Opinion of the Majority of the Court of Appeals.

We have urged that the majority of the Court of Appeals committed error of such immediate and far-reaching significance that a grant of certiorari is strongly indicated. The error of the majority inheres in its judgment and the opinion which shaped that judgment.

That *opinion* merits the most careful consideration because unless rendered nugatory by a grant of certiorari, and a reversal of the judgment below, it must, for the reasons we urged, generate widespread confusion and a rash of appeals throughout our courts on the large question of the scope of the 1939 Amendment.

We have faced that opinion, analyzed it, and centered much of the argument in the petition upon it. Our argument against its error is now a matter of record, but not once in its entire argument of 21 pages has Respondent as much as touched upon it and only once[17] has it adverted to Chief Judge Biggs' dissent.

We respectfully submit that the arguments we urged on the facts at bar, the judgment and both opinions below have not been answered by the Respondent.

Point VIII

The Reasons for Granting the Writ Still Obtain.

Respondent's Brief has, if anything, reinforced the reasons for granting the writ.

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15. Brief, p. 14.
16. Petition, pp. 23-24.
17. pp. 10-11.

1. The *Southern Pacific Co.* cases[18] present the same large and novel question as the case at bar—the scope of the 1939 Amendment.

On page 21 of its Brief, Respondent alleges that those cases merely involve the validity of the "new construction" doctrine. Having tangentially argued the merits of those cases (incorrectly, we might add), it then claims at page 22 that those "back-shop cases were based upon *a misunderstanding of the scope of the Act*". (Emphasis supplied.) We repeat: the same question is involved and Respondent obviously agrees.

2. This decision is in conflict with *Lillie v. Thompson*, 332 U. S. 459 68 S. Ct. 140 (1947).

Respondent's comment in this respect sharply underscores the strikingly distorted view it, the majority of the Court of Appeals and *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (D. C. N. D. Cal. 1947), take of the Act. Once again the "workshirt" view appears. Lillie's function is irrelevant; all that matters to respondent is that she "worked in direct contact with trains traveling on tracks" while "petitioner in the case at bar, worked in an office building".[19] Indeed, it now appears that Respondent does not even care if Lillie's job fulfilled the interstate commerce prerequisite of the 1939 Amendment. Such blind indifference to job function and its relationship to the tests laid down in the 1939 Amendment is the logical and patently erroneous conclusion of the "workshirt" view.

3. Respondent's attempt to negate the conflict between this case and *Straub* is based on extraordinary grounds—that Straub's job occasionally "brought him" to locomotive

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18. *Southern Pacific Co. v. Gileo; Southern Pacific Company v. Moreno; Southern Pacific Company v. Aranda; Southern Pacific Company v. Eufrazia; Southern Pacific Co. v. Eelk*, certiorari granted Oct. 10, 1955, Docket No. 257.

19. Brief, p. 23

cabs (not a part of the record of the case) and he traveled from state to state.[20] The *Straub* court said at 183: ". . . but that fact has no bearing on whether his duties furthered or substantially affected interstate commerce".

Straub worked on the sixth floor of Reading Terminal Building in Philadelphia and was injured there while helping a female fellow employee remove some office forms from a high shelf above. The ladder which caused the injuries was propped against some filing cabinets at the time of the accident.

If the truncated "transportation" view and respondent's argument as to why Lillie was covered by the 1939 Amendment were applied to the *Straub* facts, Straub could not conceivably be covered by the 1939 Amendment. Certainly he did not work "in direct contact with trains traveling on tracks". He "worked in an office building". Yet he was properly held within the ambit of the 1939 Amendment because his *job function* was the one critical fact that controlled just as it should be in the case at bar.

4 and 5. There is a conflict between *Thomas v. Union Railway Co.*, 216 F. 2d 18 (C. A. 6, 1954) and the opinion of the majority of the Court of Appeals in this case. Thomas was an office worker, 1954 *Workmen's Compensation Law Reports*, ¶ 5325, yet that was no bar to his maintenance of an action under the FELA. The majority's opinion and the *Holl* case, for the reasons we argued earlier, cannot subsume office workers *qua* office workers under the 1939 Amendment.

There is also a conflict between the majority's opinion and *Erickson v. Southern Pacific Co.*, 39 Calif. 2d 324, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952). *Harris v. Missouri Pac. R.*, 158 Kan. 679, 149 P. 2d 342 (1944); *Jordan v. Baltimore and Ohio Railroad Company*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

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20. Brief, p. 23.

The *Ericksen* case squarely destroyed the "Railroader" argument which is the burden of the opinion of the majority and the Respondent, when the Court held at page 645:

> "The defendant contends that the Act does not apply to the plaintiff because he is not a 'railroader' exposed to the risks peculiar to railroading. The Act furnishes a broader definition of those eligible to its benefits. It is made applicable to any employee whose duties further interstate commerce 'or shall in any way directly or closely and substantially' affect such commerce. 45 U. S. C. A. § 51."

The *Harris* and *Jordan* cases reflect very clearly that the scope of the 1939 Amendment is much broader than the majority's interpretation or the theory advanced by the Respondent.

6 and 7. Respondent has said not a word in refutation of these important reasons for granting the writ. This Court certainly is entitled to assume that if there were an argument to be made against them, it would have been made, for, perhaps more than any of the other important reasons advanced, these reflect the vast ramifications and importance of the question at bar.

CONCLUSION.

The test of coverage under the FELA is, and always has been, the interstate character of the employment. The Respondent's whole argument departs from that test and equates coverage with hazard. In brief, the argument is this: the purpose of the Act is to protect those whose duties bring them in close proximity to the intrinsic hazards of railroading. Hence, the engineer, the fireman, the switchmen, &c. are covered, but the "office worker" is not. Such a test, of course, disregards the basic criterion of the *interstate* (as opposed to hazardous) nature of the work. Its use runs head-on into a complete inconsistency.

Assume that a locomotive engineer, in the course of his duties, is attending an investigation in Respondent's 32nd Street Office Building and that a window breaks because of a known defective condition and injures him. If that engineer is covered,—as he undoubtedly is,—the "hazard" test is obviously totally inappropriate, because he was not injured by any intrinsic railroad hazard.

Now assume that an employee in the blue print office at 32nd Street is on one occasion directed to take a tracing directly to the foreman in charge of repairing track between 32nd Street and the Philadelphia Suburban Station. While on the tracks, the employee is negligently run over by an engine and killed. In that event the "hazard test" would compel a conclusion of coverage, but this cannot be, according to Respondent, because the employee is an "office worker", even though the instrumentality of injury was one of those very hazards intrinsic in railroading. Such examples as these could of course be multiplied many times.

It is totally illogical to argue that coverage depends on exposure to hazard, but that nevertheless protection is afforded for many injuries not the result of the hazard, and not afforded for injuries that are the result of the hazard.

For all of the foregoing reasons, we respectfully urge that the Writ of Certiorari should issue.

Respectfully submitted,

Joseph S. Lord, III,
Seymour I. Toll,
Richter, Lord, Farage & Levy,
Counsel for Petitioner